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limitation must have been good or bad at the date of the deed, the subsequent events would not affect it. So a testator might devise land to a son for life, with remainder to his son's children in fee, and with power for the son to appoint a life estate to his widow in precedence of the remainder to the children. If the son were young at the testator's death, he would very likely marry a wife unborn at that time, and, if he exercised the power in her favor by appointing a life estate to her, the remainder to his children in fee would be rendered invalid. Lord Coke would probably have managed this better with his rule regarding common possibilities and double possibilities.[4] He would have said that, the remainder after the life estate of John Foran's widow, being limited, not to *her* children, but to *his*, was good, because it was only a common possibility that he might marry somebody and have issue surviving him, which would not have involved inquiring whether the widow was the mother or when she was born. He would not have been likely to think that this remainder was affected by the triple possibility of his marrying an unborn wife, and having issue by that wife, and leaving both the wife and such issue surviving him. Perhaps a similar course might have been followed with the modern form of the rule, on the ground that the case was not within the reason of the rule, even if it might possibly be within its words. The case has nothing in common with *In re Frost*,[5] which was referred to in the judgment, because there the remainder was limited, not to issue living at the death of the first life tenant, but to issue living at the death of the survivor of the husband and wife, or, in default of such issue, to other persons then to be ascertained, and there was no issue. Kay, J., thought that involved the double possibility of a marriage with an unborn person and of the contingency to take effect upon the death of that person. The rule in *Whitby* v. *Mitchell* seems inadequate to this case, although the remainder was clearly void according to the rule against perpetuities, if that rule was applicable, as Kay, J., also held that it was. On the other hand, the limitation in *Park's Settlement* was clearly valid according to the rule against perpetuities, and it vested at the same time as the widow's life estate and independently of it.

RECENT CASES.

BILLS AND NOTES — DEFENSES — WAIVER OF DEFENSE BY EXECUTION OF RENEWAL NOTE. — The defendant with knowledge of a right of recoupment for defective performance of a contract, gave a renewal note for the full amount of the original note. Any cross-action by the defendant was barred by the Statute of Limitations. *Held*, that the defendant cannot recoup his damages in an action on the renewal note. *Stewart* v. *Simon*, 163 S. W. 1135 (Ark.).

The proposition that a renewal note is subject to the same defenses as the original is not absolutely true. Where the original was tainted with illegality, the renewal note is no better. *Chapman* v. *Black*, 2 B. & A. 588; *Wynne* v.

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[4] 2 Rep. 51 b (1593); 1 Rep. 156 a (1598).
[5] 43 Ch. D. 246, 253 (1890).

Callander, 1 Russ. 293. *Cf. Flight* v. *Reed*, 1 H & C. 703. The same is true when the defense is lack of consideration. *Commonwealth Ins. Co.* v. *Whitney*, 1 Metc. (Mass.) 21; *First National Bank* v. *Black*, 108 Ga. 538, 34 S. E 143. As between the immediate parties to the instrument, these are absolute defenses. Other defenses, however, may be waived. Thus giving a renewal note with knowledge of the defense of fraud operates as a waiver of that defense. *Edison General Electric Co.* v. *Blount*, 96 Ga. 272, 23 S. E. 306; *White* v. *Sutherland*, 64 Ill. 181. The authorities also generally recognize that the execution of a renewal note, with knowledge of the defense, will operate as a waiver of the defendant's right to refuse full performance on his side of the contract because of the defective performance rendered by the other party. *American Car Co.* v. *Atlanta City St. Ry. Co.*, 100 Ga. 254, 28 S. E. 40; *Archer* v. *Bamford*, 3 Stark. 175; *cf. Kirkpatrick* v. *Muirhead*, 16 Pa. 117. The right of recoupment is a defense of this nature; and a waiver of it is therefore effective. See WILLISTON, SALES, § 605. This waiver alone, however, should not deprive the defendant of his affirmative cross-action or counterclaim for breach of contract. See WILLISTON, SALES, § 485. But the fact that the defense of recoupment has been waived becomes very material, when, as in the principal case, the Statute of Limitations has run against the affirmative right.

CARRIERS — BILLS OF LADING — LIABILITY ON BILL AFTER DELIVERY OF GOODS.— A short shipment was made under an order bill of lading. The plaintiff bank discounted a draft with the bill attached, although the bill was then three months old and had already been deposited with the bank on four successive occasions as security for drafts subsequently dishonored and taken up by the shipper. Prior to the last discount, the consignee had secured the goods from the carrier without surrendering the bill, and had paid the shipper. The bank sues the carrier. *Held*, that it cannot recover. *Fourth National Bank* v. *Nashville, C. & St. L. Ry. Co.*, 161 S. W. 1144 (Tenn.).

A carrier which issues an order bill of lading and then delivers the goods to one not the holder of the bill, is liable as a converter. *Boatman's Saving Bank* v. *Western & A. R. Co.*, 81 Ga. 221, 7 S. E. 125. Even if delivery is to the holder, failure to take up an order bill makes the carrier liable to a subsequent innocent purchaser. *Ratzer* v. *Burlington C. R. & N. Ry. Co.*, 64 Minn. 245, 66 N. W. 988; *Walters* v. *Western & A. R. Co.*, 56 Fed. 369. The reason for this liability is that the carrier has represented by leaving the bill outstanding that it is still backed by goods and should therefore reimburse an innocent purchaser of it for value. In the principal case in view of the short shipment, the long time the bill was outstanding and the dishonored drafts, the court seems right in saying there could have been no honest reliance on the carrier's representation. Estoppel therefore could not be invoked and the plaintiff could only rely on the consignor's right which, as he had received payment, amounted to nothing at the time of discount.

CARRIERS — DISCRIMINATION AND OVERCHARGE: WHETHER EXTENSION OF CREDIT TO SOME BUT NOT ALL SHIPPERS CONSTITUTES DISCRIMINATION. — The defendant railway company, departing from its regular course of business, did not require a regular monthly settlement from a coal company for the carriage of coal, but accepted notes. The railway renewed the notes and finally accepted in exchange three year debenture bonds. The railway was indicted: (1) for violating Sec. 6 of the Interstate Commerce Act in accepting a different compensation from the published rate; (2) for violating Sec. 2 of the Elkins Act which prohibits discrimination. *Held*, that the railway was properly convicted, at least as to the second count of the indictment. *Hocking Valley* v. *United States*, 210 Fed. 735 (C. C. A., 6th Circ.).

The case seems clearly right on the facts, since here the shipper was getting a